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The Montana Public Service Commission: A Profile of Weakness

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Introduction

Sources and Expectations of Utility Regulation

Utility regulation in Montana has perennially occupied center stage in Montana politics. The Montana Public Service Commission has been a persistent subject of heated controversy concerning the quality of protection it has given the consuming public. This situation has not been unique, because state regulatory commissions generally have not enjoyed good reputation with students of public affairs. The Montana Public Service Commission is characteristic, therefore, in that it has few defenders and many critics. The common view in Montana—the opinion of a newspaper editor, a law professor, an attorney, a legislator, a housewife, a former utility employee —is that the Montana Public Service Commission is in the "back pocket" of the state's largest utilities. Public attitude toward utility regulation is important when adequacy of energy sources is being widely debated. The Commission soon will be asked again to make significant decisions concerning utility rates and practices. How should its regulatory decisions be received? This article attempts to provide information that will help answer this question.*

In 1913 the Montana Legislative Assembly created the Public Service Commission to protect the consumer by supervising, controlling, and regulating public utilities in the public interest. This move was a concession by the legislature that effective regulation demanded detailed knowledge and continuing attention that the legislature itself had not been able to provide. The commission was thought to have certain strengths that would enable it to carry out its mandate. It should provide flexibility and expert knowledge in the state's attempts to maintain a fair balance between rates and service under constantly changing circumstances.

For many reasons, in Montana as elsewhere, this regulatory design has been less effective than was expected. State regulatory commissions were endowed by legislatures with broad discretionary power. Vaguely stated formal requirements to determine rates in the "public interest" gave the commissions great potential control over the activities of utilities. The utilities responded by increasing their political vigilance and activity. At the same time, the regulatory commissions were hampered by a role conflict between administrative functions and judicial functions lodged in the same body. To the degree that the administrative or investigative characteristic came to be deemphasized, the commissions became passive agencies increasingly dependent upon expert and informed presentations by the regulated company.

Marver Berstein has provided an interesting interpretation of the apparent failure of these regulatory bodies in the United States. [Bernstein, Regulating Business by Independent Commission (1955) 74-102.] His cyclical theory traced evolution of a regulatory body through consecutive stages of crusading reform, identification with the goals of a specific industry's management, and finally institutional senility taking refuge in the status quo which it had fostered. There were many reasons for this decline, but Berstein stressed the overwhelming superiority of the regulated industry in its technical knowledge and the ignorance of the general public about regulatory matters. Public ignorance meant indifference and lack of support for vigorous regulation. Lacking support for vigorous activity, the regulatory commission eventually closed ranks with its only defender, the regulated industry, to become, in time, the protector of the

*The Report is based upon the author's Ph.D. dissertation in Political Science, The Montana Public Service Commission: A Study in Administrative Decision-Making, University of Notre Dame, 1973.

industry. Thus Bernstein generalized American experience with regulatory commissions.

Commentaries on the status of governmental regulation of business usually refer to the final stage of this cycle. In 1951 Harold Ickes asked:

> [W]ho today believes that the public interest is served by these State commissions? In the course of time the private utilities muscled their way in by the usual methods with the result that the commissions, in effect, became adjuncts . . . of the private utilities. [Gellhorn and Byse, Administrative Law (4th ed., 1960) 39.]

Paul MacAvoy attributes distortion of the intent of regulatory commissions to the greater expertise of the regulated industry: "In the end, rates are fixed which reflect no other reality than that of compromise, reinforced partly by the superior advantage of the utilities in litigation." [MacAvoy, The Crisis of the Regulatory Commissions (1970) 11.] Grant McConnell echoes the conclusions of Bernstein: "The outstanding political fact about the independent regulatory commissions is that they have in general become the promoters and protectors of the industries they have been established to regulate." [McConnell, Private Power and American Democracy (1966) 287.]

The most severe criticism of attempts at regulation, however, is not the failure effectively to regulate but the concern that interest group domination of the regulatory process has poisoned the entire political system. McConnell has said that comprehensive efforts of a regulated industry to achieve a favorable regulatory climate result in "corruption in the political process itself." [*Ibid.*, 32] Paul Douglas noted a corrupting backlash to state regulation:

> With the coming of state regulation of electricity, gas and telephone rates, these private utilities then reached out increasingly to control the state governments and to regulate their supposed regulators. Every student and practitioner of politics knows how these private utilities have been among the most corrupting forces in state politics during the last 30 years. [Gellhorn and Byse, Administrative Law (4th ed., 1960) 42.]

Charges of regulatory failure, interest group domination, and impairment of the political system have been voiced in Montana politics for years. Upon his election to the Montana Public Service Commission in 1935, Jerry J. O'Connell said:

> Too long have the consumers of Montana paid the cost of election activities of the power trust here; too long have they paid the cost of the lobbying activities of these companies seeking every special privilege they can obtain; too long have the consumers paid for the wine, the women, and the whisky which changes legislative minds at every assembly since Montana was admitted to the Union; too long has the consumer's money been used to place the burden of taxation upon them and relieve the profit-mad plunderers of Montana. [*The Western Progressive*, January 4, 1935.]

In 1954 Attorney General Arnold Olsen charged the Public Service Commission with refusal to resist utility and railroad rate increase requests: "It is painfully evident the consumers of Montana are not going to be protected by their Railroad and Public Service Commission." [*Great Falls Tribune*, March 15, 1954.] In 1967 Senator Lee Metcalf said the Montana Power Company was behind a "drive for economic and political domination" of Montana. [*Great Falls Tribune*, August 20, 1967.] In the 1972 Montana Constitutional Convention, Missoula delegate George Heliker, a professor of economics, stated:

> [O]ne needs no special expertise in the esoteric realms of that ritualistic enterprise laughingly referred to as 'regulation' of public utilities to know that it is one of the great scandals of American state government in the twentieth century. Anyone even faintly acquainted with the facts knows that, in all but a handful of states, the corporations who were to have been regulated in the consumer's interest have long since become the regulators—regulating regulatory commissions, regulating legislatures, regulating courts, regulating opinion, and regulating elections. ["Statement of George B. Heliker to the Montana Constitutional Convention Public Health, Welfare, Labor, and Industry Committee, February 5, 1972" (Helena, 1972) 1-2.]

Thus, criticism of the regulatory process in Montana, as elsewhere, often rests on a perceived invasion of a public or governmental function by a private, narrowly defined interest. The organized private interest is depicted as usurper to the degree that it weakens the public institution's advocacy of the public interest. The fact that a public interest exists to be defined through substantive policies cannot easily be dismissed. Imprecision of available criteria admits a wide range of possible resolutions, and the size of the financial interests involved insures that conflicting approaches will be articulated.

The writer believes that a public interest can be identified in utility regulation, and that it must balance the rate-payer's burden and the economic soundness of the utility—service to the consumer and profit to the investor. How ever the balance is struck, the definition of the public interest will always be subject to pressure from all parties to the bargain for a redefininition more favorable to their particular interest. Accordingly, private utilities are not pirates because they are profit oriented. Their tactics to achieve favorable regulatory policies need not be regarded as sinister. Because the conditions on which regulatory decisions are based change, and because all parties will continually seek adjustments in the existing regulatory scheme, the public interest can never be immutably identified. Thus, discussion of the public interest might more profitably focus on the regulatory system's procedural aspect, on its operating relationships and its rules, rather than on the outcome of the process. The public interest has broad and enduring significance when it is defined in terms of the openness and fairness and thoroughness of the process that ultimately leads to the regulatory decision. In concrete terms, this means that the regulatory process could be functionally open and not merely formally open; all parties to the hearing would have equal access to competent professional representation, to complete and reliable information, and adequate time to prepare arguments. It means that the commissioners would accompany their decision with a clear, well-reasoned written opinion. Such formulation of the public interest could give added meaning to a discussion of the adequacy of utility regulation in Montana.

The Montana Public Service Commission:

An Unfulfilled Promise

The task the Montana Public Service Commission was established to accomplish has never been in doubt. In 1923 the commission clearly expressed its mandates. Prior to its establishment:

> [E]very rate to a consumer of a product of a public utility in Montana rested on private contract between the consumer and the utility. Some of these rates were unjust, unreasonable, discriminatory, and unduly preferential. To put a stop to practices of that character, to improve the service rendered by public utilities, to cause to be fixed just, reasonable, and equitable rates for the service rendered, and to equalize the burden between consumers, manifestly were objects within the legislative intention. [*State ex rel Rankin, Attorney General* v. *Helena Light and Railway Company*, 1924 Public Utilities Reports, Series B, 13.]

But the obstacles in the way of the commission soon became obvious. Adequate material support and necessary powers and guidelines never were provided by the Montana legislature.

In 1967 the authorized expenditure level of the Montana commission was the lowest of the public service commissions in eleven western states; only five states (Alaska, Delaware, New Hampshire, Rhode Island, and Vermont) had budget levels below Montana. [This and following comparative data are derived from United States Senate Committee on Governmental Operations, "State Utility Commissions," (Washington, 1967).] In the same year only five states (Alaska, Delaware, Rhode Island, Utah, and Vermont) had a smaller utility commission staff than Montana's fifteen persons, and only the Utah commission had fewer staff positions than Montana among the eleven western states. These eleven western states, listed in descending order of commission staff size, were California, Oregon, Washington, Arizona, Colorado, New Mexico, Nevada, Idaho, Wyoming, Montana, and Utah. Salaries of full-time state regulatory commissioners ranged from $10,000 to $29,160 throughout the United States in 1967. New York paid the highest amount, while Montana along with Nebraska, North Dakota, Rhode Island and Utah paid the lowest salary.

The three Montana commissioners along with their single rate analyst have the task continuously to audit the books of each utility company under their jurisdiction; the power to initiate rate investigations; and the duty to prescribe fair rates of return for the utility companies. The regulatory burden on the Public Service Commission can be appreciated by comparing the size of its 1970-1971 appropriation to the number and worth of the utilities it was responsible for regulating. The three commissioners with their 20-man staff and a budget of $237,916 had the job of regulating over 600 transportation carriers and about 200 public utilities. The total plant valuation of these utilities regulated in 1970-1971 was set by the commission at $689,073,000 and the total gross revenue of these companies was put at $169,880,000.

Although rate determination is the most publicized task of the Public Service Commission, it is only part of the commission's overall job of supervision. The commission also is to determine if the companies have sufficient facilities to promote the safety, convenience, and interests of the rate payers, the general public, and the utility's employees. The commission is authorized to establish and supervise a uniform system of accounts for the reporting requirements of the utilities; it must approve their issuance of securities and bonds; the commission can initiate rate investigations, authorize the abandonment of services, and watch for discrimination in services. Despite this scope of responsibility the Montana Public Service Commission does not possess many powers that other state commissions exercise, especially those powers that closely regulate the internal business operation of the utility. For example, 18 state utility commissions regulate exports of electricity; 16 authorize hydroelectric development; 37 prohibit a utility from acquiring another type of utility; 47 regulate the sale, merger and purchase of facilities; 22 regulate declaration of dividends; 35 can regulate the reorganization of a utility; 20 require advance submission of a utility's budget; and 15 require competitive bidding on property additions. The Montana Public Service Commission possesses none of these powers.

Despite the volume of work the Public Service Commission handles and the potential impact of its decisions on the average citizen of the state, the agency possesses a low level of public visibility. A 1972 survey conducted by the writer found that of 234 persons contacted in Great Falls, Missoula and Helena, 87 percent were unable to name any incumbent member of the Montana Public Service Commission. The persons contacted were almost equally ignorant of the duties of the commission. Seventy-five percent of those contacted could not state a commission function, other than to rephrase the question in terms of the commission "protecting the public" or "serving the public." It thus appears that vigorous utility regulation should not look to public backing for the source of its strength.

It is clear that the Montana Public Service Commission occupies a difficult political position. The job laid out for it by statute is imposing. With its limited resources and a ridiculously small public utilities department, the commission presents a David and Goliath image as it sets out to regulate a major part of the state's corporate wealth and managerial talent. Yet under the present system of selecting members of the commission, an electorate that is not alert and knowledgeable concerning matters of utility regulation picks commissioners to make decisions that greatly affect the economic life of the state. Because of the great responsibility and the intense policy conflict at the heart of public utility regulation, the commissioner selection process should be able to recruit persons with relevant training, abilities and interests. A scrutiny of the background and qualifications of Public Service Commissioners in Montana reveals another source of commission weakness.

The original design for utility regulation anticipated that commissioners would have either a pertinent professional background or the demonstrated capacity and

determination to acquire the necessary expertise. For example, a background in law, accounting, engineering, economics, or marketing is consistent with the demands of the job. In addition to such professional requirements, and probably more important, the commissioner should be keenly aware of the conflicting claims to his allegiance and able clearly to determine his role amid these tensions. His mark of excellence is his ability to demonstrate that his judgment is reasoned and independent. Montana Public Service Commissioners, with very few exceptions, have come to the position without impressive credentials. The modest salary level of the office, the position's low public visibility, failure of the political parties to interest persons in the office, and the solicitous concern of the regulated utilities in the commission all may have affected the qualifications of the commission's membership throughout the years.

Since 1913 when the Board of Railroad Commissioners began regulating public utilities in Montana, there have been twenty-two commissioners. Unusual career patterns have developed on the commission primarily because it comprises three six-year staggered terms. The commission has been a career merry-go-round for six commissioners who, unseated in one election, regained a position in a few years. Lengthy but interrupted careers have been strung together by some men. Others have served on the commission for long consecutive periods. Seven commissioners (Boyle, Dennis, Young, Casey, Middleton, Smith, and Boedecker) have accounted for 126 of 180 service years on the commission since 1913.

But longevity of commissioners in service does not in itself guarantee the expert, professional, and independent regulation that the Montana Legislative Assembly and the state courts long ago concluded they could not provide. Political parties and the popular election process were relied upon to insure that men who spent many years on the Public Service Commission were competent in their office. Yet most commissioners appear to have emerged from backgrounds completely extraneous to utility regulation; a few men came from jobs in industries subject to regulation by the commission. Thus at least six men had prior work experience with railroads, and one had owned and operated an intrastate bus line. The pre-commission positions in these instances were not of sufficient managerial responsibility to serve as professional training grounds for the commission, and thus they would hardly provide sound basis for a conflict of interest charge. Montana has witnessed none of the free flow of high-level talent between commissions and regulated industries often seen at the federal level. Of the remaining commissioners, two had a background in farming and ranching, and three had been active in real estate. The only other occupation appearing with some frequency in the commissioners' background is insurance, which was the pre-commission business of four men. The work backgrounds of the remaining commissioners included: salesman, newspaper editor, student, radio station operator, laborer, and personal aide to the governor. Nothing in this litany of pre-commission experiences suggests that the commissioners were well-versed in the problems, tools, and intricacies of utility regulation by way of prior jobs.

Montana commissioners have not notably been prepared for their duties by their education. Education would seem to have a role to play in the preparation of a commissioner, either in lieu of suitable pre-commission work experience or complementary to such experience or interests. In the United States, law has represented the primary educational background of regulatory commissioners. It is clear, however, that professional training in accounting, economics, engineering or marketing would all be relevant to the job of commissioner. The educational background of nine of the twenty-two commissioners could not be determined, but career patterns indicate that they had not had formal academic preparation in fields normally thought to be related to public utility regulation. Three of these nine men had worked for railroads, one as a passenger conductor, one as a passenger agent, and the other as a fireman; one man had been a farmer, one a realtor, one a radio station operator, and the remaining three men spent most of their pre-commission work life in elective county positions and as low-level state employees. One commissioner completed eight years of school and six commissioners terminated their formal education after high school. Six commissioners attended college. While it may be presumptuous to specify a proper educational background for the job of utility regulation, only Jerry O'Connell, through his legal education, seems to have had some positive preparation that in context could be called professional education.

Name recognition has played an important role in electing Public Service Commissioners in Montana. Some commissioners established their names politically before they were on the commission by holding or running for lower state offices or county positions. Other commissioners, as has been observed, have served on the commission for many years, and the longest of these careers were not made up of consecutive terms. Other men, such as Boedecker and Holmes, traded on the political value of their fathers' names and political careers. The frequency and persistency of familiar names on the ballot gave the voter an easy solution in voting for an obscure office. Through the years such commissioners came to possess a most proprietary relationship to their office.

Weakness of the Public Service Commission can be seen in its performance as well as in its resources and membership. The commission's interpretation of its statutory responsibility to protect the public interest can be inferred from an analysis of its decisions over the years. Between 1915 and 1972 the Montana Public Service Commission decided 264 utility cases for which written formal opinions and orders were reported. Study of these cases suggests that the Montana Public Service Commission demonstrated an overall preference for utility interests in general compared to consumer interests between 1915 and 1972. There were twenty-one separate compositions of commission membership during these 57 years. Ten three-member clusters sat during the first twenty-eight years of the commission, and eleven comprised the second period of the agency. Bernstein's

theory of commission life cycles with declining regulatory vigor appears to characterize the Montana experience. The ten commissions between 1915 and 1942 decided 54 percent of their cases for the utilities, while the commissions after 1942 decided 91 percent of their cases in favor of the companies.

The Montana Political System:

Graveyard of Regulatory Reform

The Montana Public Service Commission decides matters of utility regulation and sets forth regulatory orders. These decisions are not simply the product of three commissioners and their staff. No single factor can sufficiently account for the nature of utility regulation in Montana. Persistent willingness in Montana to attribute regulatory decisions favoring large utilities to bribes and payoffs is legendary but grossly superficial and probably misdirected. The thrust, content, and limitations of rate decisions have more probably been determined by other elements of the Montana political system. Political parties have traditionally commented on utility regulation, to influence the policy agenda for the legislature. The commission is a creature of the legislature; its structure and powers are products of legislative action or non-action. And the 1972 Montana Constitutional Convention had an unique opportunity to rewrite completely the ground rules of utility regulation.

Major political parties in Montana, like those elsewhere in the United States, have had two important functions. They have attempted to bring diverse groups together in support of their candidates, and they have advocated certain policies and philosophies of government. The platforms of the Montana Democratic and Republican parties reveal vivid contrasts in formal positions on utility regulation; these positions suggest the respective orientations of their leadership structures. These contrasts have been especially significant since the mid 1950's when the pressure of monetary inflation heated up Montana regulatory politics. Populist strains in the state Democratic Party have given the state a base for reform sentiments. From 1956 through 1970, the Democrats repeatedly called for major reforms in the regulation of privately owned utilities. The Democratic platform of 1956 was typical of that party's views on regulation during those years:

> We urge that the Legislature provide the Public Service Commission with . . . independent, competent and qualified rate experts and engineers . . . to make proper recommendation to the Commission in all future rate cases, and that it require of all rate applicants specific and complete evidence of its operating costs, taxes, and cost of capital invested. . . .
>
> We urge the creation of the office of Public Defender to assure the people that their interests are protected in this state, where utility interests are so powerful.
>
> The staggered 6-year term of Public Service Commissioners tends to make this board insensitive to public opinion and public interest. We urge the Legislature to make a study of the situation with a view of making the board more responsive to the public interest.
>
> We urge the Legislature [to] review and study the method by which the rate base of public utilities is determined, and protect the public against excessive rates.
>
> We view with pride the accomplishments resulting from the REA partnership between farmer cooperatives, public power districts and the Federal Government. . . .

Meanwhile Republican platforms were silent concerning utility regulation or called for an end to the special income tax advantages that cooperatives enjoyed. The 1962 Republican platform denounced claims of the Bureau of Reclamation to parts of the Missouri River as attempts to "destroy individual enterprise and drastically limit area development," opposed the federal government's Knowles Dam on the ground it would destroy "the tax base of several counties," and urged that cooperatives be made to "assume their fair share of the cost of government." Given the predictably partisan overtones of these platforms, they did inject goals for regulatory reform into the state's public arena.

All paths to change of the Montana regulatory situation lead to the Montana Legislative Assembly. The platforms of the Democratic Party have consistently recognized this fact, but in the end the campaign recommendations have proved to be futile. A *Missoulian* editorial (December 4, 1967) said: "If Montanans wish to remove this debate forever, . . . the public, via the legislature, has full power to straighten things out." The Montana Supreme Court has repeatedly identified the state legislature as the real battleground for regulatory reform. In 1921 the court said:

> It is well-settled law that rate-making is purely a legislative act. . . . The legislature itself has the undoubted authority to regulate public utilities, and by means of a duly constituted commission it operates through its administrative medium. [*Billings Utility Company* v. *Public Service Commission*, 62 Mont. 21, 33 (1921)]

In 1970 the court said:

> It is a basic rule of law that the Commission, as an administrative agency, has only those powers specifically conferred upon it by the legislature and in determining those statutory powers, this Court must give effect to every word, phrase, clause, or sentence therein. . . . [*City of Polson* v. *Public Service Commission of Montana*, 155 Mont. 464, 469 (1970)]

To understand why the Public Service Commission has behaved as it has, and to understand the fundamental constraints on that body, it is necessary to examine the fate of regulatory reform proposals in the legislature.

The Public Service Commission was established in 1913 as an ex officio arm of the Montana Board of Railroad Commissioners. From that time through the 1971 Legislative Assembly, 90 reform measures of various sorts were introduced and only ten of these bills ultimately became law. Democrats sponsored 38 percent of the total and thus had no corner on claims to regulatory reform. Democratic sponsorship was scattered throughout the thirty sessions, while 17 of 26 Republican-sponsored bills appeared between 1913 and 1933. In recent sessions reformers in both parties have joined forces to sponsor measures for change. Eleven of nineteen jointly sponsored bills were introduced from 1967 to 1971. While the Democratic Party has been solely responsible for less than 50 percent of the regulatory reform bills, its advocacy has

been more consistent and insistent, and in recent years it has noticeably been the more outspoken voice of reform.

Although the measures introduced in the Montana legislature to change the operating status of utilities have been far-ranging, some specific reforms have been pushed repeatedly over many years. For example, the legislature was asked on seven occasions to investigate operations of the Public Service Commission. There were seven legislative proposals to change the name of the Montana Board of Railroad Commissioners, usually to something like the "Montana Public Service Commission," and eleven attempts to abolish the commission. Recurrence of such proposals emphasizes the defeat or quiet death of most of these bills. Of the ten bills enacted after the 1913 statute established the commission, four were passed in the 1971 legislature and six of the ten since 1961, indicating that strength of reform views in the state legislature is recent. Three of ten bills that became law were special appropriation measures; two authorized the Legislative Council to study the Public Service Commission; an administrative procedure act and an executive reorganization bill that made the "Public Service Commission" the head of a Department of Public Service Regulation also were enacted. The only *bona fide* piece of reform legislation enacted before 1961 was a 1937 bill that authorized the Public Service Commission to earmark and impound the difference between old and new rates pending final determination in a rate case. In 1961, after two failures in past years, the commission was given the power to regulate and supervise the issuance of securities by Montana public utilities. In 1971, a territorial integrity bill was passed that would protect one electric company's service area from invasion by another.

The most significant evidence of the legislative relationship to the Public Service Commission is found in the 79 bills that were killed. As the parent of the regulatory body, the legislature repeatedly stifled the commission's growth and ability to innovate. It engulfed and buried the regulatory reform attempts of a singular crusading Public Service Commission in 1935, of scattered progressive Democrats over the years, and of a recent coalition of reform-minded Democrats and Republicans. The fate of these bills reflects the fact that operations of the Public Service Commission long have been an intense political issue, yet no strategy and organization have developed an adequate reform vehicle. A commission that "might have been" always existed in the minds of the reformers, but counter-forces in the legislature always prevented its realization.

Some of the reform bills were radical and all demonstrated a common assumption of the weakness of the commission. Bills to give the commission a name that more clearly identified for the public and voters its public utility regulation task often gave way to bills to abolish the commission outright, or to dismantle and replace it with something different. On four occasions it was proposed that the duties of the commission be transferred to the Board of Equalization; in various sessions it was suggested that cities and towns should regulate utilities, or that a new commission of other state officials such as the auditor, agriculture commissioner, and state engineer, or the governor, secretary of state and auditor, should have these regulatory duties.

Most bills, however, proposed to attack major ills of the commission rather than destroy it. The selection process for commissioners and staff were often addressed. Three bills would have had the Governor appoint the commissioners, and one of these proposals called for a single appointed public utility commissioner. Three bills aimed to correct weaknesses in the staff of the commission. The most radical staffing proposal was a 1971 bill to create a utility consumer's counsel in the Attorney General's office to represent consumers in rate cases. This bill amounted to assertion by its sponsors that the Public Service Commission was unable properly to carry out its dual role to protect the consuming public while serving as an impartial quasi-judical agency. Seven bills recognized that there was an information problem for the commission in its attempts to reach decisions from limited and unilaterally prepared data; these proposals sought to strengthen the reporting requirements of the public utilities to the Public Service Commission. A bill concerning evidence in commission proceedings would have placed the burden of proof in rate cases on the utility petitioning for an increase. Another bill would have required the public utility to pay the cost of a mandated valuation investigation by the commission, and seven bills went still further, calling for changes in the valuation criteria for rate-making that would better protect the consumer.

The largest category of reform bills, those to increase the regulatory power of the commission, exhibited a certain optimism about the basic regulatory approach. Fifteen of these 22 bills were prepared in 1935 at the request of Commissioners Jerry J. O'Connell and Thomas Carey who found sympathetic sponsors in the legislature. This aggressive legislative advocacy by commissioners was unique in the history of the relationship between the commission and the legislature. *The Western Progressive* reported on February 15, 1935, that the Public Service Commission "presented to the legislature its legislative program designed to end domination of political activities in this state by the Montana Power Company and affiliated corporations." The 1935 bills empowered the Public Service Commission to investigate all contracts of public utilities with other parties, to supervise the budget process of public utilities, to reduce rates of any company making an excessive profit on its capital investment, and to review and revise downward prior writeups in value of utility property.

Some reformers hoped that the Montana Constitutional Convention of 1972 could circumvent persistent unwillingness of the legislature to alter the status quo in utility regulation. George Heliker, Missoula delegate and professor of economics at the University of Montana, sponsored a proposal to: establish a single commissioner appointed by the governor; fix the commissioner's role as defender of consumer interests; free the commissioner from judicial control and the fair value standard; and authorize the legislature to set up public power distribution agencies free from the commissioner's control.

Heliker believed that future legislative reform attempts would repeat the past, so that constitutional reform was in order.

Privately owned utilities, both large and small, strongly opposed Heliker's proposal. Their testimony made it clear that they preferred the existing regulatory situation. Any change in the state's method of regulating utilities would result in new relationships, new procedures, and possibly new policies. Heliker's plan embodied the hope that the desired regulatory realignment would achieve tougher regulation. The strategy of the reform advocates was opposed by the utilities and rejected by a majority of the Public Health, Welfare, Labor, and Industry Committee. The committee majority said that the matter should be left to the legislature, that it was too experimental to be taken seriously, and that they had received little evidence that the present regulatory system was not satisfactory. The delegates rejected use of the new state constitution to achieve what their legislative cousins had failed to accomplish in utility regulation. Failing to view utility regulation as a fundamental and enduring governmental concern, the Constitutional Convention left reform to another day.

So it has happened that Montana regulatory policies have been the products of a web of relationships within the state's political system. Reform policies have not lacked advocates. Such measures have repeatedly been articulated in inconsequential party platforms, in minority reports of legislative committees, and in a minority proposal of the Constitutional Convention. Legislative and convention majorities rejected reform, and fundamental weaknesses of the Public Service Commission have been left untouched. There has been no effective vehicle for regulatory reform in Montana politics.

Conclusion

A Call for Uncommon Leadership

The Montana Public Service Commission was established to regulate the public utility industry in the public interest. Fair and open procedures for utility regulation should guarantee that adequate service is available to all consumers without discrimination at the lowest reasonable rates. It is expected that rates take into account the reasonable needs of both the consuming public and the utilities. Yet more often than not the commission has appeared to place the needs of the utility companies before the needs of utility consumers. As we have seen, this policy orientation is the product of a complex set of factors whose net result has been to keep the commission weak and passive as a public agency.

The commission has been repeatedly criticized for failing to defend the public interest. Farm groups, cooperatives and the ideological left, traditionally harbored in the Montana Democratic Party, have taken the position that the public sector should allocate the state's material resources; they would accomplish through government what they have been unable to achieve privately. These reformers believe that change in commission procedures will place them in a better position to influence policies because the regulatory system at present is relatively closed to their influence.

A second critical perspective is more basic, recognizing that utility regulation must accomplish a compromise between public ownership and unchecked private monopoly. The political environment of utility regulation in Montana has raised the possibility that government regulation of utilities could ruin a privately owned business. The statutory definition of regulation has fostered both politicization and an undiluted private business, "free-enterprise" posture in the state's privately owned utility industry. The Montana legislature has declared certain kinds of utilities to be "public," but the intent of the word and the means to secure this intent through the operation of the commission have never been established. This failure to define the conditions for making utilities truly "public" has allowed them to remain essentially "private" and unregulated. In response to these ambiguities the utility industry has become what no vehicle of reform in Montana has ever been: organized, cohesive, disciplined and policy-minded. The commission has been "privatized" because channels to it have been kept narrow and exclusive. Thus the commission accepts the utilities' definition of the public interest, that is, what they think to be best for Montana concerning utilities. The commissioners hear systematic presentation of the public interest only as the utilities see it because no other body, public or private, possesses comparable information, resources and organization. In consequence regulatory politics in Montana reacts against established policies and attempts to alter both the power alignment in the state and the dominant political philosophy that maintains these policies.

Much discussion of utility regulation in Montana has expressed clashes between competing public and private utility interests and their allies. The primary question how to make the utility industry serve the public has not received adequate discussion. Because publicly owned utilities and cooperatives possess political and economic legitimacy as do privately-owned utilities, the "public interest" must be defined through the political process in which different interests can be expressed at different times. The "public" cannot be permanently identified with any fixed or given set of absolute values or altruistic principles. Nor can the public interest be identified only by the size of utility bills or the rate of return on the utility's investment. By over-simplifying the idea of the public interest, opponents of the privately owned utilities and of the existing regulatory situation have made utility regulation common currency of Montana politics. Such narrow delineation of a valid political issue—the adequacy of utility regulation—has mortgaged the state's political system to suspicion and cynicism and to inordinate infiltration of the public processes by a regulated private business.

The Montana regulatory situation will always be a product of relationships as complex as those comprising the status quo. A new balance of these tensions in the Montana political system must be realized before a different definition of the public interest can begin to evolve. No simple yet effective program for change seems possible, but necessary conditions for a strong and indepen-

dent commission can be identified. The public interest in the area of utility regulation must be defined in procedural terms. The system of utility regulation in Montana must be put on a fair and balanced basis to secure the political health of the state. A reform of the regulatory system must rest upon a generally held belief that the rate structure, at whatever level it is set, is the product of exhaustive investigation reflecting the judgment of respected and self-respecting professionals.

Initially it is the unfulfilled duty of the Montana Legislature clearly to define the "public" character of the privately owned utilities. This will amount to an authoritative classification of the permitted and prohibited, the regulated and unregulated activities of privately owned utilities. These statements of legislative policy will increase the burden of the commission but give it heightened prestige. Recognition of the importance of the commission's charge should be accompanied by provision of adequate resources and sufficient staff expertise. In the absence of such legislative action to create commission independence that has been markedly absent in Montana, regulatory politics will remain the province of half truths and worn-out debate.

Commensurate with its increased duties the commission should become an expert administrative agency akin to an administrative court. The Governor should appoint highly-paid persons of unquestionable professional stature to serve as commissioners. It is also indispensable that the separate office of consumer counsel be carefully staffed and adequately funded to handle the duties of consumer advocacy, because the commission has not been able to carry out effectively both its deciding and its investigative duties. Professional commissioners would accompany their decisions with reasoned opinions telling why a case was so decided. Principles of rate-making would be structured into the clash of the contending parties, and the decision-making process would occur in a climate of seeking and experimenting among openly articulated public values.

It is difficult to see how measures less than these will dispel the heavy cynicism that surrounds Montana politics. A supportive change in public attitudes probably will support courageous though uncharacteristic legislative initiatives. Such steps will open up the regulatory system and they may diminish the string of compromises that has been its history.

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